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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KERRY REEVE, Defendant and Appellant.	H045173 (Santa Clara County Super. Ct. No. C1504784)

A jury convicted defendant Kerry Reeve of manufacturing a controlled substance. The trial court suspended imposition of sentence and placed defendant on three years' formal probation. On appeal, defendant's counsel filed an opening brief in which no issues are raised and asked this court to independently review the record under *People v. Wende* (1979) 25 Cal.3d 436. We sent a letter to defendant notifying him of his right to submit a written argument on his own behalf on appeal. He has not done so.

Finding no arguable appellate issue, we affirm. We will provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed," as required by *People v. Kelly* (2006) 40 Cal.4th 106, 110. We will further include information about aspects of the trial court proceedings that might become relevant in future proceedings. (*Ibid.*)

I. BACKGROUND

A. Factual Summary

Melanie and Charles Pearson own a home in Los Gatos. There was a pool house located in the backyard. Sometime between 2009 and 2011, the Pearsons permitted

defendant to construct and live in a shed on their property in exchange for doing work around the house and yard. The shed was a two-room lean-to structure. It abutted the back wall of the pool house, which also served as one of the shed walls. The door to the shed opened into a sitting room. A door separated the front sitting room from the back room, which served as defendant's bedroom. Defendant had access to the bathroom in the pool house.

On the evening of January 11, 2015, Jeremy Myers and his then-girlfriend, Ashley, were cooking in defendant's sitting room. Myers and Ashley were homeless at the time and defendant allowed them to stay with him occasionally. Myers testified that one of their bags was in the sitting room and the others were stacked outside the shed under an overhang.

Defendant was in his bedroom. Myers heard "a little hiss" followed by "a little bang" come from the bedroom. When he looked in the bedroom he saw a small fire on the floor. Defendant and Myers tried unsuccessfully to put the fire out using a blanket. Myers sustained burns to his hands and arm in the process. After about five minutes, the fire had engulfed the bedroom and spread to the front room. Defendant went to the main house and told Melanie to call 911, which she did.

Shortly before 10:00 p.m., police and fire officials responded to the structure fire on the Pearson property. Active fire suppression was delayed for approximately one hour because an unidentified line was down in the area of the fire. Firefighters took a defensive position, preventing the fire from spreading but allowing it to burn uncontrolled in the shed and pool house, until Pacific Gas and Electric confirmed that the downed line was not an electrical power line. Firefighters then undertook offensive operations to extinguish the fire. They succeeded in knocking down the open flames at around 12:30 a.m. on January 12, but the fire continued to smolder. The fire was fully extinguished sometime between 1:00 a.m. and 6:00 a.m. on January 12.

Melanie testified that the fire "completely destroyed" the shed. Myers, who

returned to the property early on the morning of January 12th after receiving medical attention, testified that "[t]here was absolutely nothing left."

Santa Clara County Fire Department Acting Chief Arson Investigator Gregory Ryan Cronin was tasked with investigating the fire's origin and cause. He arrived on the scene before 10:00 p.m. on January 11, when the fire was still actively burning. He began his investigation, including accessing portions of the pool house and the shed, before the fire was extinguished. However, he suspended his investigation and left the scene at about 1:00 a.m. because active firefighting continued. Cronin returned at 6:00 a.m. and resumed the origin-and-cause investigation. At that time, he found a comforter in the bedroom portion of the shed, adjacent to a burned mattress. Under the comforter, Cronin discovered a canister of butane, a heat gun, a bag containing marijuana, and a glass tube packed with a green leafy material consistent with marijuana. The items under the comforter were relatively unscathed by the fire, according to Cronin, because the comforter had formed a "thermal barrier" that protected them from the heat and flames. Cronin recognized the items under the comforter as being associated with the illegal manufacturing of butane honey oil. Therefore, he suspended his investigation and notified the Los Gatos Police Department.

Los Gatos Police Department Corporal Derek Moye conducted the criminal investigation. Moye, who testified as an expert on the manufacture of butane honey oil, testified that butane honey oil is a concentrated form of marijuana. He explained that butane honey oil is produced by pouring butane through a glass or metal tube that is stuffed with marijuana, collecting the substance produced in a dish, and evaporating the butane, often with heat. The remaining substance is butane honey oil. Moye testified that butane honey oil is usually made using shake, the leaves and stems of the marijuana plant, as opposed to the buds.

Moye testified that the bag of marijuana that Cronin found in the shed contained between a half-pound and a pound of shake. Moye opined that the items found in the

shed (i.e., the marijuana, the butane, the glass tube packed with marijuana, and the heat gun) were used to manufacture butane honey oil.

After contacting police, Cronin completed his origin-and-cause investigation. In his capacity as an expert in the investigation of the origin and cause of fires, he opined at trial that the fire originated in the bedroom. He further opined that the cause of the fire was ignition of the butane, which is flammable. Cronin based that opinion on the properties of butane and on defendant, Myers, and Ashley's statements to police describing the fire "as a sudden woosh and jet of flame that shot out of the bedroom and into the seating area and wrapped around the table and under the love seat."[1] Cronin was unable to determine what caused the butane to ignite; he noted that there were a number of possible ignition sources in the bedroom, including a refrigerator, a cigarette butt, a television, the heat gun, electrical outlets, and a ceramic heater.

Defendant and Myers were treated at the hospital for burns. Defendant spoke to a police officer at the hospital shortly after the fire. He stated that he thought the fire had been started by "a can of lighter fluid next to a ceramic heater on the floor in his bedroom." Cronin testified at trial that if a butane canister were sitting against a ceramic heater, it would not ignite because the heater would not get sufficiently hot.

Defendant testified in his own defense. He acknowledged that the butane cannisters and heat gun found at the scene were his. He said he used butane for a soldering torch he used in electrical work, lighters, and heaters, and that he used the heat gun to dry paint. Defendant testified that he had purchased a three-pack of butane at a flea market the afternoon before the fire and placed it on a shelf in his bedroom. That

[1] Defense counsel did not object. Later, on cross-examination, she requested a sidebar, after which the court told jurors that "an expert witness such as Captain Cronin can rely on hearsay as part of formulating his opinion, but that's the only thing that you could consider with regard to the hearsay. [¶] In other words, the statements made by those witnesses are not being offered for the truth of those statements, but the Captain can rely on those statements in formulating his opinion. So the hearsay statements are admitted only for that limited purpose of Captain Cronin formulating his opinion."

evening, he recalled bumping into the shelf and hearing one of the butane canisters hit the ground. About 30 or 45 minutes later, he was sitting on his bed using his laptop when he heard a "woosh" and "[t]hen the whole room lit up." He threw a comforter on the fire in an attempt to put it out, badly burning his hand.

Defendant "assumed that [the butane canister he knocked to the ground] rolled in front of the heater and that's what, about a half hour, 45 minutes later, exploded like that." He did not see the butane container roll up against the heater, he simply "guess[ed]" that it did. Defendant denied that he was making butane honey oil. He also denied that the marijuana and glass tube were his, saying he had never seen either in his home.

B. Procedural History

The Santa Clara County District Attorney filed an information on August 25, 2016 alleging that defendant manufactured a controlled substance (Health & Saf. Code, § 11379.6, subd. (a); count 1) and unlawfully caused a fire to an inhabited structure (Pen. Code, § 452, subd. (b); count 2).[2]

In December 2016, defendant moved to suppress all the evidence seized from the shed as the fruits of an illegal warrantless search. (§ 1538.5.) The prosecutor opposed the motion, arguing that the exigent circumstances exception to the warrant requirement justified the search. For that argument, the prosecutor relied on *Michigan v. Tyler* (1978) 436 U.S. 499, 510, in which the United States Supreme Court held that fire officials are not required to obtain a warrant "to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." The *Tyler* court further concluded that in that case, fire investigators did not need a warrant to *reenter* the burned structure early the morning after the fire. The investigators had started investigating while the fire was being extinguished, but darkness, steam, and smoke caused them to "depart[] at 4 a.m. and return[] shortly after daylight to continue their investigation."

[2] All further statutory references are to the Penal Code unless otherwise indicated.

(*Id*. at p. 511 [reasoning "that the morning entries were no more than an actual continuation of the first [entry], and the lack of a warrant thus did not invalidate the resulting seizure of evidence"].)

The trial court held a hearing on the suppression motion on January 19, 2017. Acting Chief Arson Investigator Cronin testified that he was assigned to investigate the origin and cause of the fire in question. He began his investigation while the fire was actively burning. Among other things, he entered part of the pool house that was not burning. Around 1:30 a.m., at which time the open flames had been knocked down but the building continued to smolder and fire suppression continued, Cronin postponed his investigation until sunrise. He returned at 6:00 o'clock the next morning and continued his origin and cause investigation. At that time, he entered the shed portion of the structure, possibly for the first time, and discovered the evidence at issue (i.e., marijuana, a glass tube, a heat gun, and butane canisters). The trial court denied the suppression motion at the conclusion of the hearing, finding that the shed and the pool house were part of the same structure and holding that Cronin's reentry of the structure was reasonable under *Tyler*.

The case went to a jury trial in May 2017. After deliberating for an afternoon, jurors returned a guilty verdict on count 1, manufacturing a controlled substance, and a not guilty verdict on count 2, unlawfully causing a fire in an inhabited structure.

On August 4, 2017, the trial court suspended the imposition of sentence and granted defendant three years' formal probation. Among the conditions of probation were that defendant serve 240 days in county jail. The court awarded defendant a total of 156 days of presentence credits, consisting of 78 days of actual custody and 78 days of conduct credits under section 4019.

The court imposed the following fines and fees: a $330 restitution fine[3] (§ 1202.4,

[3] The transcript of the sentencing hearing indicates that the court imposed a $30 restitution fine, while the minute order states that the fine was imposed in the amount of $330. The probation report recommended a restitution fine of between $300 and

subd. (b)(1)) with an additional probation revocation fine in the same amount, which was suspended pending successful completion of probation (§ 1202.44); a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) plus penalty assessments; a $150 drug program fee plus penalty assessments (Health & Saf. Code, § 11372.7, subd. (a)); a $40 court security fee (§ 1465.8); a $30 criminal conviction assessment fee (Gov. Code, § 70373); a $129.75 criminal justice administration fee payable to the town of Los Gatos (Gov. Code, §§ 29550 et seq.); a $200 presentence investigation fee (§ 1203.1b); and a $25 monthly probation supervision fee (§ 1203.1b).

The court also referred the matter to Department 61 for a veterans' court and mental health court assessment. The court stated that the judge in Department 61 was "free to modify this sentence as he sees fit."

Defendant signed a treatment court sentencing agreement on September 13, 2017. The judge revoked defendant's probation and approved the treatment court sentencing agreement that same day.

Defendant timely appealed the judgment on September 29, 2017.

On October 3, 2017, the judge in Department 61 ordered defendant released to Frank Rainy of the VA on October 5, 2017 and ordered that defendant reside at 10 Kirk Avenue in San Jose and follow the court ordered-treatment plan.

II. DISCUSSION

Having examined the entire record, we conclude that there are no arguable issues on appeal.

III. DISPOSITION

The judgment is affirmed.

$10,000. Handwritten notes on the probation report strike out "$300" and "$10,000" and add "[$]330." Section 1202.4, subdivision (b)(1) requires the trial court to impose a restitution fine of not less that $300. In these circumstances, we conclude that the transcript contains a typographical error and that the minute order correctly indicates that the court imposed a $330 restitution fine.

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ELIA, ACTING P. J.

WE CONCUR:

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MIHARA, J.

_____

GROVER, J.

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